

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS F. BOWLES
Claimant

VS.

TAP ENTERPRISES, INC.
Self-Insured Respondent

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Docket No. **1,034,381**

ORDER

Self-insured respondent requests review of the June 15, 2011 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on September 7, 2011. The Workers Compensation's Director appointed Gary Terrill of Overland Park, Kansas, to serve as Board Member Pro Tem in this matter in place of former Board Member Julie A. N. Sample.

APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for the claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Although not listed in the Award, Dr. Vito Carabetta's July 22, 2010, Independent Medical Evaluation Report and his November 22, 2010, letter addressed to the Honorable Steven J. Howard are part of the evidentiary record.¹ At oral argument before the Board, the parties agreed that the second period of temporary total disability compensation ended on February 19, 2008, instead of the March 13, 2008, date used in the Award. The parties further agreed that all authorized medical should be awarded and not left upon application as incorrectly stated in the Award.

ISSUES

It was undisputed claimant injured his left shoulder in a fall at work on July 7, 2006. But respondent denied claimant suffered bilateral carpal tunnel syndrome as a result of the fall. And there was a disagreement regarding calculation of the claimant's average weekly wage.

¹ R.H. Trans. at 4.

The Administrative Law Judge (ALJ) determined claimant not only injured his left shoulder but also suffered bilateral carpal tunnel syndrome as a result of his fall at work. Consequently, the ALJ awarded claimant compensation for a 35 percent permanent partial disability to the left shoulder; a 20 percent permanent partial disability to the left upper extremity; and, a 10 percent permanent partial disability to the right upper extremity. The ALJ further determined claimant's average weekly wage was \$830.80.

The respondent requests review of the following: (1) whether the claimant's bilateral carpal tunnel syndrome arose out of and in the course of employment; (2) nature and extent of disability; and, (3) average weekly wage.

Claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant started work for respondent on June 25, 2006. He was employed as a tractor/trailer driver and was paid \$100 a day, mileage and a commission based upon sales. On July 7, 2006, claimant was on a ladder repairing an old patch on the top of a trailer that was leaking. As claimant was making the repair the ladder shifted and he fell onto the grating on the back of the truck attached to the trailer. Claimant fell head first 8-10 feet with his arms outstretched to brace the fall. Claimant testified his hands broke his fall but he had problems right away with his left shoulder and a laceration to his left thumb.

Claimant was taken to the emergency room at Hunterdon Medical Center in New Jersey. He had a small laceration to his left hand near his thumb, abrasions to the right hand and an anterior left shoulder dislocation. The shoulder dislocation was reduced and the laceration at the base of the left thumb was treated. Upon return to his home in Missouri, the claimant received follow-up treatment with Dr. Cooper and x-rays of the left shoulder revealed a Hill-Sachs lesion. Claimant had significant weakness and problems with the left shoulder and an MRI scan was performed on August 3, 2006. The scan revealed a complete full thickness rotator cuff tear with retraction of the tendon. There was also evidence of a tear of the anterior inferior glenoid labrum.

Claimant was then referred to Dr. Leesa Galatz, a board certified orthopedic surgeon. Dr. Galatz evaluated claimant on September 19, 2006, and diagnosed claimant's left shoulder with a rotator cuff tear which had torn two of the muscles of his rotator cuff. On September 25, 2006, Dr. Galatz performed an arthroscopic repair of the complete tear of the supraspinatus. An open biceps tenodesis (suturing the end of a tendon to the bone) and open repair of the subscapularis tear were also performed. Dr. Galatz testified:

Q. Okay. Was there any difficulty in doing this repair at all?

A. It was a difficult repair. We found at the time of surgery that the tendon tissue was not really great quality. There was a significant amount of retraction, which means it had pulled back away from its normal attachment, so it was a difficult repair.²

Post-surgery the claimant received physical therapy and continued to be followed by Dr. Galatz. Claimant also underwent a functional capacities evaluation (FCE) on March 6, 2007, which revealed significant deficits with overhead activities on the left and bilateral deficits in finger dexterity, finger speed, coordination and grasping activities. Dr. Galatz released claimant at maximum medical improvement on March 13, 2007.

Because of ongoing difficulties with his left shoulder the claimant was unable to return to work. Claimant sought help with the welfare office and he was referred to the Missouri rehabilitation department. The Missouri rehabilitation department sent claimant to Dr. Clark for an evaluation and Dr. Clark referred claimant back to Dr. Galatz for further evaluation. Claimant saw Dr. Galatz again on September 11, 2007, and examination revealed claimant still had weakness in his shoulder and there was insufficiency of subscapularis muscle function. On October 22, 2007, Dr. Galatz performed a surgical left pectoralis major muscle transfer on claimant due to the insufficiency of the left subscapularis muscle function. Claimant then went through extensive physical therapy. On February 19, 2008, Dr. Galatz found claimant was at maximum medical improvement and released claimant from her care with permanent restrictions. The permanent restrictions included no lifting greater than 40 pounds, no lifting over shoulder height and claimant was to avoid activity with the arm in a sustained outstretched position.

In a letter dated March 13, 2008, Dr. Galatz provided a permanent impairment rating. Dr. Galatz rated claimant's left upper extremity at 5 percent due to loss of motion and then an additional 5 percent was given for the loss of subscapularis function. These two ratings combine for a 10 percent functional impairment to the left upper extremity. Dr. Galatz testified that she used the Fifth Edition of the AMA *Guides*³ but that she was not aware of any major changes between the Fourth and Fifth Editions and she believed her opinion was in accord with the Fourth Edition. But on recross-examination, Dr. Galatz testified:

Q. Doctor, just one more thing about the Fifth Edition versus the Fourth Edition. You indicated that you believed that the rating that you gave would be consistent with the Fourth Edition but you did not consult the Fourth Edition to verify that?

² Galatz Depo. at 11.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

A. No, I have not looked up and compared the two editions.⁴

After Dr. Galatz released claimant respondent did not take him back and he found a job in June 2008 driving a dump truck for Hill Trucking in Rogersville, Missouri. Claimant continued working there until November 2009. Since that time he has been taking care of his elderly father.

At respondent's attorney's request, Dr. Gary Baker, board certified in internal medicine, general and plastic surgery, examined and evaluated claimant on February 7, 2007. Upon physical examination, Dr. Baker found claimant's left shoulder lacked internal rotation that was diminished by 30 degrees and claimant's wrists were positive to Tinel's testing and also positive to the Phalen's test. The doctor also found that direct palpation of the right hand revealed mild to moderate thenar muscle atrophy. The doctor reviewed the medical records that were provided and also took a history from claimant. Dr. Baker opined that claimant's bilateral carpal tunnel syndrome was not caused by his work-related injury on July 7, 2006. Dr. Baker testified that 2 percent or less of all carpal tunnel syndromes are traumatically induced versus repetitively. The doctor opined that claimant's carpal tunnel syndrome is more chronic than acute.

Dr. Baker opined that claimant did not suffer an acute carpal tunnel injury or a traction injury of either median nerve on the date of his work-related injury. The doctor was not able to find any complaints or observations that would support acute carpal tunnel syndrome or a median nerve traction injury. The doctor recommended that claimant undergo some additional testing to determine where his ulnar nerve problem is located and also bilateral carpal tunnel surgery to prevent advancing muscle atrophy on the right and new muscle atrophy on the left. As to claimant's shoulder rating, Dr. Baker agreed with Dr. Galatz and with regards to claimant's bilateral carpal tunnel syndrome the doctor agreed with Dr. Carabetta's ratings.

On cross-examination, Dr. Baker testified that individuals can be diagnosed with carpal tunnel syndrome due to a single traumatic event or from repetitive use. The compression of the median nerve decreases the blood flow to the nerve and therefore the symptoms of carpal tunnel appear. Dr. Baker further opined that claimant's fall onto his hyper extended wrists would possibly aggravate his developing carpal tunnel syndrome.

Dr. Preston Koprivica, board certified in occupational and emergency medicine, examined and evaluated claimant on November 3, 2008, at claimant's attorney's request. The doctor reviewed claimant's voluminous medical records including emergency room notes, Drs. Cooper, Walker, Galatz's records, August 3, 2006 MRI, and additional orthopedic and hospital records. Claimant was complaining of weakness, loss of motion and pain. Upon physical examination, Dr. Koprivica opined the findings were consistent

⁴ Galatz Depo. at 32.

with the type of injury he suffered on July 7, 2006. Claimant had thenar atrophy regarding the muscles at the base of his left thumb which Dr. Koprivica opined is in relation to the median nerve. And the mechanism of injury where claimant landed on his hands can cause injury to the median nerve. Claimant had Tinel's findings that would suggest having carpal tunnel syndrome on both sides but the Phalen's test was negative bilaterally. The doctor also found claimant had weakness and significant pain with motion deficits. Dr. Koprivica opined claimant suffered injuries to his left shoulder, wrists bilaterally and laceration to the left thumb. The doctor diagnosed claimant as having an anterior dislocation of the left shoulder associated with the development of symptomatic acromioclavicular arthralgia, chronic impingement symptoms, significant rotator cuff tear and labral injury as well as provocative findings for carpal tunnel syndrome along with severe thenar atrophy on the right. Claimant also had a laceration to the left thumb that was successfully repaired. Dr. Koprivica recommended electro diagnostic studies on both upper extremities to determine if claimant needed additional treatment. The doctor opined claimant was at maximum medical improvement if no additional invasive intervention was required.

Dr. Koprivica testified:

Q. You mentioned earlier that they initially found a torn rotator cuff with retraction. What does that mean?

A. All muscles are attached at both ends to bone. When you have a rotator cuff tear, what's happened is one end, the tendon for the muscle is torn, and when you have a complete tear it means it's torn in two. When that tendon tears in two, now the muscle's only effectively attached on one end. It's not attached to the other end. And when the tear is that extensive, where the tear is will retract away from each other and the muscle tends to atrophy as that occurs. You start losing muscle.

Q. Does that make a repair more difficult?

A. Yes.

Q. And does that affect the ability of the body to recover even after an attempt has been made to surgically repair the tear?

A. Yeah. The more significant the tear, the greater the retraction, the ability of the body to fully recover is reduced in terms of likelihood.⁵

Dr. Koprivica rated claimant's loss of motion deficits and shoulder girdle impairments, using the Combined Values Chart, he assigned an overall 35 percent impairment to the left upper

⁵ Koprivica Depo. at 8.

extremity. The doctor also rated claimant's carpal tunnel syndrome on the right at 20 percent and on the left at 10 percent.

Dr. Koprivica reviewed Dr. Carabetta's report including the nerve testing and opined that claimant has moderate severity carpal tunnel syndrome bilaterally. The doctor further opined that claimant's carpal tunnel syndrome is a result of his work-related injury. Upon physical examination claimant had subjective symptoms such as weakness and thenar atrophy but he wasn't complaining of any pain, numbness or tingling.

For loss of motion to claimant's left shoulder impairment, the doctor assigned a 14 percent and a 10 percent for the distal clavicle resection. These two impairments combine for a 23 percent based on the *AMA Guides*, Fourth Edition. The remaining 12 percent was due to residual weakness based on the Fifth Edition but the impairment regarding weakness on a neurological basis was the same as the Fourth Edition.

Q. And did you note in reviewing Dr. Carabetta's report any comment that he made regarding the sufficiency or insufficiency of the Fourth Edition in assessing this gentleman's impairment?

A. I did. Dr. Carabetta basically said that the severity of the structural injuries and the outcome from that were not sufficiently addressed in the fourth edition of the *Guides*. And so he just assigned a 25 percent impairment based on his belief clinically as to the level of impairment.⁶

On cross-examination, Dr. Koprivica noted claimant's FCE on March 6, 2007, indicated mild to moderate deficits in finger dexterity, speed, coordination and grasping activities. And that such findings were indicative of bilateral carpal tunnel syndrome.

On April 20, 2010, the ALJ entered an Order appointing Dr. Vito Carabetta to conduct an examination of claimant. After reviewing the claimant's medical records and examining claimant, Dr. Carabetta noted that his objective findings on examination suggested claimant could have a compression neuropathy problem in the carpal tunnel. Consequently, Dr. Carabetta suggested claimant be scheduled for bilateral upper extremity electro diagnostic studies. Dr. Carabetta also proceeded to rate claimant's left shoulder at 25 percent but noted it was not possible to quote a specific table or section in the *AMA Guides* as his shoulder problem was complex due to the full thickness rotator cuff repair with tendon retraction and the subsequent pectoralis major muscle transfer. Consequently, Dr. Carabetta utilized physician judgment in arriving at his rating.

Based upon Dr. Carabetta's recommendation electrodiagnostic testing was performed which confirmed claimant suffered bilateral carpal tunnel syndrome. Dr. Carabetta then issued a supplemental report dated November 22, 2010. The doctor noted

⁶ Koprivica Depo. at 20.

that he reviewed the electrodiagnostic studies and claimant had a moderate case of carpal tunnel syndrome on the right and a mild case on the left. Based upon the AMA *Guides* the doctor rated claimant at 10 percent for the left and 20 percent for the right. Dr. Carabetta then noted: "Based on the available information, as there has not been any specific prior injury to this area, these impairment ratings are fully apportioned to the injury in question."⁷

Claimant ultimately elected not to proceed with the recommended bilateral carpal tunnel surgery.

Average Weekly Wage

Robert Wiltshire, respondent's controller, testified that respondent hired claimant on June 20, 2006. Mr. Wiltshire confirmed that claimant was being paid \$100 a day plus mileage and a commission. Mr. Wiltshire noted that claimant would work 18 days and then would be off work 18 days. Mr. Wiltshire further testified that during the time period claimant worked before the date of accident he received \$1,000 dollars in base pay, \$255.99 for mileage and \$89.30 in commission which was earned before the accident.⁸

K.S.A. 44-511(b) provides for the calculation of the claimant's average weekly wage. K.S.A. 44-511(b)(1) provides for a worker with an annual salary; K.S.A. 44-511(b)(2) provides for a worker paid a monthly salary; K.S.A. 44-511(b)(3) provides for a worker paid a weekly salary; K.S.A. 44-511(b)(4) provides for a worker paid by the hour; and K.S.A. 44-511(b)(5) provides for a worker paid by the piece, commission, percentage, flat rate or any other basis not fixed by the year, month, week or hour.

Since claimant was paid a flat daily rate plus mileage and commission the calculation of his average weekly wage is controlled by K.S.A. 44-511(b)(5) which provides:

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specific job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately

⁷ Dr. Carabetta's Letter dated November 22, 2010.

⁸ Wiltshire Depo. at 19.

preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

The first sentence of K.S.A. 44-511(b)(5) provides that if an employee was employed before the accident for a minimum of one week, the average gross weekly wage is determined by averaging the total pre-injury wages earned by the number of weeks of employment subject to a 26-week maximum. This is the applicable method in this case because claimant worked more than one week. Consequently, dividing the \$1,345.29 gross wages claimant earned by the 1.71 weeks employed before the accident results in a gross average weekly wage of \$786.71.

Respondent argues that pursuant to sentence three of K.S.A. 44-511(b)(5) a calculation should be made to determine what the claimant was reasonably expected to earn. But as pointed out by claimant, sentence two and three of K.S.A. 44-511(b)(5) refer to a factual situation where the claimant has worked less than a week before the accident. And as previously noted, claimant in this case had worked more than a week before his accident.

Nature and Extent of Disability

Initially, respondent argues that the accident did not cause claimant's bilateral carpal tunnel syndrome. The Board disagrees. The claimant fell face first and attempted to break his fall with his outstretched arms. The emergency room records confirm that he injured his hands as well as his left shoulder. Although the claimant did not have the usual symptoms associated with carpal tunnel syndrome, the FCE revealed deficits in finger dexterity, speed, coordination and grasping activities which are consistent with carpal tunnel syndrome. And because of his lack of symptoms, those findings were not followed up. Obviously, the primary focus was claimant's shoulder complaints. However, by the time Dr. Koprivica noted the bilateral carpal tunnel condition, the claimant had developed severe right thenar atrophy.

Dr. Koprivica attributed the bilateral carpal tunnel syndrome to the work-related accident. Dr. Carabetta, the court appointed medical examiner, concluded the bilateral carpal tunnel syndrome was related to the fall at work. Conversely, respondent's expert,

Dr. Baker, did not believe the bilateral carpal tunnel syndrome was related to the fall at work. But Dr. Baker agreed that individuals can be diagnosed with carpal tunnel syndrome due to a single traumatic event. And Dr. Baker further agreed that claimant's fall onto his hyperextended wrists would possibly aggravate his carpal tunnel syndrome that was developing. The Board finds the opinions of Drs. Carabetta and Koprivica more persuasive and compatible with the facts of this case. Consequently, the Board affirms the ALJ's finding that the fall at work caused the claimant's bilateral carpal tunnel syndrome.

The Board is mindful respondent argues that claimant worked as a dump truck driver after his accidental injury and infers that was a more probable cause of his bilateral carpal tunnel syndrome. But when claimant was examined by Dr. Koprivica he had only worked for the subsequent employer approximately four months and the atrophy found in his right thumb due to the injury to the median nerve would take over a year, according to Dr. Koprivica, to be as severe as it appeared on examination. And the FCE noted problems with the fingers compatible with carpal tunnel syndrome before the dump truck driving job.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁹

The doctors all noted the severity of claimant's left shoulder injury. Dr. Carabetta noted that the AMA *Guides* did not even begin to address claimant's overall presentation. Dr. Baker adopted Dr. Galatz' rating but as noted by the ALJ, Dr. Galatz' rating was based upon the Fifth Edition of the AMA *Guides* and not verified by the Fourth Edition. Dr. Carabetta provided a 25 percent rating for claimant's left shoulder. Dr. Koprivica provided a 35 percent rating for claimant's left shoulder. The ALJ adopted Dr. Koprivica's 35 percent functional impairment left shoulder rating as the most in conformance with the AMA *Guides* and the claimant's condition. The Board agrees and affirms.

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

As previously noted, the parties agreed claimant reached maximum medical improvement on February 19, 2008, instead of the March 13, 2008, date used in the Award. Consequently, the calculation of the award for the left shoulder scheduled injury will be modified to reflect temporary total disability compensation for the time periods July 7, 2006 through March 13, 2007, and September 11, 2007 through February 19, 2008, for a total of 58.85 weeks.

Drs. Carabetta and Koprivica rated claimant's carpal tunnel syndrome on the right at 20 percent and on the left at 10 percent. And Dr. Baker adopted Dr. Carabetta's ratings. The ALJ adopted those findings and the Board affirms. K.A.R. 51-7-8(c)(4) provides that an injury at the joint on a scheduled member shall be considered a loss to the next higher schedule. Consequently, the bilateral carpal tunnel injuries will be compensated at the level of the forearm which provides for 200 weeks. The ALJ's Award will be modified accordingly.

It should be noted that when an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.¹⁰ In this case it was never alleged that claimant was permanently totally disabled and the fact that after he was released from treatment he performed the job driving the dump truck from June 2008 until November 2009 rebuts the presumption.

Lastly, the ALJ's Award noted that all authorized medical care may be awarded upon application to the director. The Board modifies that finding to reflect all authorized medical care is ordered paid by respondent.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the Director for approval.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹¹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

¹¹ K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 15, 2011, is modified to reflect claimant's average weekly wage was \$786.71; the compensation for the bilateral carpal tunnel condition should be calculated using 200 weeks; the claimant is entitled to 58.85 weeks of temporary total disability compensation; authorized medical is ordered paid and the Award is otherwise affirmed.

Left Shoulder

Claimant is entitled to 58.85 weeks of temporary total disability compensation at the rate of \$483 per week in the amount of \$28,424.55 followed by 58.15 weeks of permanent partial disability compensation, at the rate of \$483 per week, in the amount of \$28,086.45 for a 35 percent loss of use of the left shoulder, making a total award of \$56,511.

Left Forearm

Claimant is entitled to 20 weeks of permanent partial disability compensation, at the rate of \$483 per week, in the amount of \$9,660 for a 10 percent loss of use of the left forearm.

Right Forearm

Claimant is entitled to 40 weeks of permanent partial disability compensation, at the rate of \$483 per week, in the amount of \$19,320 for a 20 percent loss of use of the right forearm.

IT IS SO ORDERED.

Dated this _____ day of October, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent
Steven J. Howard, Administrative Law Judge